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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

In re D.A., a Person Coming Under the
Juvenile Court Law.

SAN BERNARDINO COUNTY
CHILDREN AND FAMILY SERVICES,

Plaintiff and Respondent,

v.

D.M. et al.,

Defendants and Appellants.

E048258

(Super.Ct.No. J205019)

OPINION

APPEAL from the Superior Court of San Bernardino County. Wilfred J.
Schneider, Jr., Judge. Affirmed.

Melissa A. Chaitin, under appointment by the Court of Appeal, for Defendants and
Appellants.

Ruth E. Stringer, County Counsel, and Ramona E. Verduzco, Deputy County
Counsel, for Plaintiff and Respondent.

Konrad S. Lee, under appointment by the Court of Appeal, for Minor.

The juvenile court removed minor, D.A., (born September 1993) from his mother¹ on March 14, 2006, after she left him with D.M. and P.M. (collectively, the foster parents) for six weeks with no provision for his care and no indication as to when she would return for him. The court placed minor with the foster parents as non-relative extended family member (NREFM) caretakers on July 31, 2006. On December 11, 2006, the San Bernardino Department of Children and Family Services (the department) removed minor from his placement with the foster parents after he was hospitalized for threatening to kill himself. The department returned him to the foster parents' care on December 31, 2006. However, minor was once again removed from the foster parents' care on April 13, 2007, after the court found true allegations in a Welfare and Institutions Code section 387² petition filed by the department. On March 25, 2009, the foster parents filed a section 388 petition (form JV-180) requesting that minor be returned to their care. The juvenile court denied the request without holding an evidentiary hearing. On appeal, the foster parents contend the court abused its discretion in denying the petition without holding a hearing. We affirm the judgment.

FACTUAL AND PROCEDURAL HISTORY

The department detained minor on November 14, 2005, after the foster parents reported to them that mother had left minor with them six weeks earlier with no provision

¹ Neither mother nor father is party to this appeal. Father was never located and never participated in any proceedings below.

² All further statutory references are to the Welfare and Institutions Code unless otherwise indicated.

for support and no indication when she would return for him. The foster parents knew minor's family for about two years and had provided for minor and his sister on numerous occasions "because the children would come to [their] home, absent the parent, needing to be sheltered and fed." Minor was found to be severely constipated requiring a trip to the emergency room. The department filed a section 300 petition alleging mother had a drug problem inhibiting her ability to care for minor, failed to attend to his medical needs, and that she had left him in the care of unrelated individuals without provision for support. (§ 300, subds. (b) & (g).) The juvenile court formally removed minor from mother on March 14, 2006.

Mother continued to live a transient lifestyle, showing up at the foster parents' home sporadically to ask for money and food.³ Minor was placed with the foster parents on July 31, 2006; the placement was deemed appropriate, beneficial, and a very good fit; the foster parents were loving and caring. However, in a status review report filed on January 17, 2007, the social worker noted that minor had run away twice within two weeks, and was hospitalized after repeated threats to kill himself: "According to [minor], he was becoming increasingly desperate to be placed with his sister and claimed to be

³ Since mother's failure to reunify with minor is not at issue in this appeal, we summarize here her participation in the proceedings below: Mother continuously failed to show for court proceedings. Although she initially participated in regular visitation with minor, her last visitation with him occurred in or around March 2007. Mother did not participate in any services offered by the department. Her attitude towards the juvenile court proceedings was noted as one of "passive disinterest." Despite her apparent awareness that minor had been hospitalized at one point, she made no effort to contact him. Mother failed to visit minor for over six months and never contacted the social worker to resume visitation.

very unhappy in his home. According to [minor], [the foster parents] bickered all the time and he claimed that their home was very chaotic. [Minor] strongly felt that [the foster parents] treated their biological children better than they treated him and made [minor] feel like a ‘foster child.’” Nonetheless, minor repeatedly requested that the foster parents also adopt his sister.

On December 11, 2006, minor was placed in the same foster home as his sister. Nevertheless, minor soon ran away, returning to the foster parents’ home. The juvenile court ordered minor temporarily placed with the foster parents on December 31, 2006.

On March 12, 2007, the juvenile court terminated mother’s reunification services. The court found minor was not adoptable; minor’s permanent plan was long term foster care. The court additionally found that “Removal from the foster parents would be a serious detriment to the minor’s emotional well-being.”

On April 12, 2007, the department filed a supplemental petition pursuant to section 387 seeking a more restrictive placement for minor. Minor was diagnosed with severe depression requiring a higher level of care. The social worker noted that the placement was currently unhealthy, emotionally damaging, chaotic, unstable, and unsuitable. Minor reported that P.M. constantly screamed and cursed at him. P.M was apparently upset because D.M. was allegedly having an affair with another woman who resided in the home. A total of 15 people, including minor, lived on the property; seven, including minor, in the main house and eight in a backhouse. There apparently were constant, volatile arguments between two factions living on the property, pertaining to who had ownership of it. The children were allegedly dragged into these battles. P.M.

screamed that she hoped D.M.’s ““dick fell off”” in front of minor. P.M. allegedly acknowledged yelling at minor, but contended that this was how she dealt with him and would continue doing so. D.M. acknowledged P.M.’s tempestuous behavior towards minor.

In hopes of saving minor’s placement, the social worker enrolled minor and the foster parents in the Wraparound program.⁴ However, the coordinator administering the Wraparound program expressed to the social worker that there were too many issues with the foster parents’ personal lives for the placement to be beneficial; the coordinator believed minor should be moved and she described her meetings with the foster parents as completely chaotic, with yelling and screaming as the main form of communication in the home; she said the foster parents appeared to have no control over their children and she noted that the foster parents spoke very negatively about minor.

According to the foster parents, minor would cut himself and continued to threaten to kill himself. A social worker conducted a visit of the home and observed the family behaving explosively in the worker’s presence. P.M. accused D.M. of having an affair with the 13-year-old daughter of the woman with whom he was already allegedly having an affair. P.M. made reference to demons residing in the backhouse. While in the

⁴ Wraparound services are “expanded family-based services . . . where services are wrapped around a child living with his . . . certified foster parent . . .” (§ 18250, subd. (a).) They are “community-based intervention services that emphasize the strengths of the child and family and includes the delivery of coordinated, highly individualized unconditional services to address needs and achieve positive outcomes in their lives.” (§ 18251, subd. (d).)

presence of the social worker, P.M. engaged in a physical confrontation with her daughter, requiring one of her sons to intervene in order to separate them.

Minor suffered from encopresis, which a doctor believed stemmed from psychological issues. When confronted with their failure to fill minor's prescription for his encopresis or follow up on a referral for a colonoscopy, D.M. denied minor had been issued a prescription; however, he had previously shown the prescription to the social worker. The social worker called and confirmed that the prescription had been issued. On April 11, 2007, P.M informed the social worker that she planned to move away from the home. The social worker believed the only reason the foster parents continued to care for minor was due to a special-care payment they received: they continuously called regarding minor's misbehavior when they did not receive the payment, but all his problems appeared to stop once they did receive it. Three referrals to the department regarding the home, ranging from emotional to sexual abuse, were pending. Nevertheless, minor preferred to remain in the home rather than being placed somewhere else. On April 13, 2007, the court removed minor from the foster parents' home.

In a subsequent report, the social worker indicated that P.M. had reportedly moved out of the home and had obtained a restraining order against D.M. P.M. reported that minor's removal from the home was probably for the best. On July 19, 2007, the juvenile court found the allegations in the petition true.

At a review hearing on April 16, 2008, it was noted that minor had run away from his most recent placement three times in the past two weeks; each time returning to the foster parents' home. Minor wished to be placed permanently with the foster parents. In

a status review report filed September 26, 2008, the social worker indicated that minor had been placed with a foster family agency since April 16, 2008. Minor still insisted that the foster parents were important individuals in his life. Nevertheless, the social worker indicated that placement with them was “determined recently not to be the most appropriate or best placement option” for minor.

On October 15, 2008, the social worker notified the court that minor had been moved to a new placement with a lower level of care on October 14, 2008. However, shortly thereafter minor returned to previous inappropriate behaviors such as emotional outbursts, going missing, and engaging in disruptive behavior at school. On February 5, 2009, minor was moved to a higher level of care.

On March 25, 2009, the foster parents filed a section 388 petition (form JV-180) seeking return of minor to placement with them and a permanent plan of adoption. The foster parents’ primary basis for asserting their petition should be granted was that the social worker’s reports, regarding the need to remove minor from his placement with them in April 2007, were based on incorrect, if not fraudulent, observations and reports. The juvenile court denied the request without granting an evidentiary hearing, checking the boxes on the court order (form JV-183) reflecting that the requested change did not state new evidence or a change of circumstances and did not promote the best interest of minor.

DISCUSSION

The foster parents essentially contend that they made a prima facie showing that their petition should be granted such that they were at least entitled to an evidentiary

hearing on the merits. They implicitly maintain that such a hearing would have enabled them to cross-examine the social worker who prepared the report in an effort to impugn her version of events. The department avers that the foster parents' petition failed to demonstrate a prima facie showing of a change in circumstances and that the best interest of minor would be met by the proposed request. We agree with the department.

“In construing the language of section 388, our Supreme Court has expressly stated ‘[a]t a hearing on a motion for change of placement, the burden of proof is on the *moving party to show by a preponderance of the evidence* that there is new evidence or that there are changed circumstances that make a change of placement in the best interest of the child. [Citations.]’” (*In re Michael D.* (1996) 51 Cal.App.4th 1074, 1083-1084.) ““Such petitions are to be liberally construed in favor of granting a hearing to consider the parent’s request. [Citations.] The parent need only make a prima facie showing to trigger the right to proceed by way of a full hearing. [Citation.]’ [Citation.]” (*In re C.J.W.* (2007) 157 Cal.App.4th 1075, 1079.) ““We review the juvenile court’s summary denial of a section 388 petition for abuse of discretion.’ [Citation.]” (*Id.* at p. 1079.)

The juvenile court acted within its discretion in denying the foster parents’ petition without permitting an evidentiary hearing. Even assuming the truth of all the allegations made by the foster parents in their petition, they still failed to contradict the underlying reason for minor’s removal: that circumstances in the home were chaotic and had taken an emotional toll on minor. The foster parents never denied that 15 people lived on the property and that they had divided themselves into two warring factions. Indeed, in their petition, the foster parents admitted that an hour before the social worker’s visit, P.M. had

engaged in an altercation with her daughter, which required the intervention of her son. Additionally, the foster parents admitted that there was “a strained relationship” with their adjacently residing family members.

Although the foster parents deny P.M. ever accused D.M. of having an affair with a 13-year-old girl living on the property, they admit there was a referral against him, albeit unfounded, of child sexual abuse. They also admit that two additional referrals had been opened regarding the home, although they contend that they had similarly been determined unfounded. The foster parents contend that one 30-minute visit would have been insufficient to justify the social worker’s conclusion that yelling and screaming was the primary mode of communication in the home. However, the foster parents did not contradict minor’s report that they “bickered all the time” and “that their home was very chaotic.” Nor did they dispute minor’s statement that P.M. constantly screamed and yelled at him. Finally, it is apparent that the social worker’s conclusion that members of the home communicated primarily in a vociferous manner was not derived solely from one 30-minute visit. Rather, in addition to the Wraparound coordinator’s purported statements and the investigating social worker’s statements, the social worker who prepared the report utilized two of minor’s own statements made on separate occasions, P.M.’s statements, and the social worker’s own telephonic discussions with the foster parents in reaching this conclusion.

The foster parents never disputed the allegation that D.M. was having an affair with another woman who resided in the home. D.M. denied ever having moved out of the home; however, the social worker’s reports indicate that it was P.M., not D.M., who

intended to and eventually did move out of the home. The foster parents denied *informing* the social worker that P.M. obtained a restraining order against D.M., but did not deny that one was actually procured. The foster parents did not deny failing to obtain minor's prescribed medication or following up on his referral for a colonoscopy. The foster parents did not dispute that minor would cut himself and continued to threaten to kill himself. Thus, even lending credence to all the foster parents' disputes with the reports, the foster parents failed to show that the circumstances within the home were anything but the chaos reflected in the undisputed portions of the reports.

Moreover, the foster parents specifically failed to allege how a return to their home would be in minor's best interest. Indeed, a "big picture" view of minor's behavior in his numerous placements indisputably reflects that minor progressed only in structured placements and digressed in less well-controlled situations. Minor consistently ran away from less structured placements, including the foster parents' home. Minor threatened to kill himself in less structured placements. Minor performed poorly in school under such circumstances; while in the foster parents' home minor was noted to be "extremely behind"; nevertheless, the foster parents requested permission to take minor on a vacation during which he would miss a week of school.

In contradistinction, minor showed great improvement when placed in a higher level of care. No reports reflect minor threatening to kill himself while in such placements. While placed in structured homes, minor made significant strides towards catching up on his almost two-year deficit in educational credits. Minor's issues with encopresis improved while in such placements and his general behavior improved. One

social worker opined that minor “appears to [thrive] in more structured settings” Indeed, when subsequently placed in a lower level of care minor returned to his previous modes of misbehavior. Both the latter foster mother and the agency suggested that minor be returned to a higher level of care: “It is believed by the undersigned that [minor] thrives in a more structured, consistent environment, which in the past, [the foster parents] have not demonstrated that they have provided to [minor].” After being returned to a structured environment, minor’s counsel below indicated that it was working for minor. Although minor’s repeated requests to live with the foster parents were entitled to some weight, “the preference of a minor child is not determinative of his or her best interests.” (*In re Melissa S.* (1986) 179 Cal.App.3d 1046, 1058.) Thus, the foster parents similarly failed to show how it would be in minor’s best interest to return to a lower level of care with them.

DISPOSITION

The judgment is affirmed.

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/s/ MILLER
J.

We concur:

/s/ McKINSTER
Acting P. J.

/s/ RICHLI
J.